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In The Supreme Court of the United States

DURA PHARMACEUTICALS, INC. *et al.*,

Petitioners,

v.

MICHAEL BROUDO *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS, AARP, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENTS

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I. INTEREST OF *AMICI CURIAE*[1]

AARP is a nonprofit, non-partisan organization with more than 35 million members, dedicated to addressing the needs and interests of Americans aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP is very concerned about fraudulent practices in the securities industry and our capital markets. Older people are frequent targets of fraud because they often have significant assets and are looking for investment opportunities to supplement the Social Security and pension benefits they will receive during retirement. As a result, AARP has made the need to combat securities fraud a high priority, and advocates the availability and enforcement of adequate federal and state statutory remedies to provide victims with financial redress.

The Naticnal Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1989. The member law firms represent investors (both individuals and institutions) and consumers in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes, and so-called "white-collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to

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[1] In accordance with Rule 37.6, counsel for AARP, NASCAT, and CFA represent that they authored this brief and that no person other than these *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

justice and compensation for the wrongs inflicted upon victims. NASCAT advocates the principled interpretation and application of the federal securities laws – including the Securities Act of 1933 (the "1933 Act"), the Securities Exchange Act of 1934 (the "1934 Act"), and the Private Securities Litigation Reform Act of 1995 (the "PSLRA") – to protect investors from manipulative, deceptive and fraudulent practices and to ensure that the nation's securities markets operate fairly and efficiently.

The Consumer Federation of America ("CFA") is a nonprofit association of 300 consumer groups that represent more than 50 million Americans. It was established in 1968 to advance the consumer's interest through research, education, and advocacy. As increasing numbers of Americans have come to rely on the nation's financial markets to fund their retirements and save for other long-term goals, CFA has made enhancing investor protections a top legislative and regulatory priority. CFA's policies in this area are based on a fundamental belief that investors are entitled to a marketplace that provides them with a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they are the victims of wrongdoing. To achieve that goal, CFA has for nearly two decades been actively involved in efforts to promote investor protection legislation and regulations, and to oppose efforts to weaken those protections, at the state and federal levels. Consistent with its belief that access to redress for wrongdoing is essential to maintaining investor faith in the integrity of our securities markets, CFA's efforts have included opposition to measures that would limit the ability of defrauded investors to recover their losses in court.

AARP and NASCAT have previously filed *amicus curiae* briefs in this Court in cases involving the construction and application of the Federal securities laws.[2]

II. INTRODUCTION

This case concerns the "loss causation" element of investors' claims seeking to recover damages under Section 10(b) of the 1934 Act and Rule 10b-5 promulgated by the Securities and Exchange Commission ("SEC"). For the reasons stated above, AARP, NASCAT and CFA are qualified to advise this Court, as *amici curiae,* of the meaning and import of Section 21D(b)(4) of the PSLRA, which codified the "loss causation" elements of Section 10(b)/Rule 10b-5 claims recognized by the circuit courts two generations ago. We note that the courts below did not analyze the language or meaning of that statutory provision in this case; however, *amici* believe that when this Court examines the relevant statutory language and the record, it will agree that Respondents properly alleged the "loss causation" element of their securities fraud claims against Petitioners. Further, AARP, NASCAT and CFA believe that the Ninth Circuit's ruling concerning the "loss causation" requirement is consistent with the important public policies underlying the federal securities laws, and that affirming the decision of the court below will further the

[2] *See SEC v. Edwards*, 540 U.S. 389 (2004) (AARP); *SEC v. Zandford*, 535 U.S. 813 (2002) (AARP-NASCAT); *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994) (NASCAT); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (NASCAT).

goal of protecting victims of investment fraud and help ensure they can obtain adequate recovery for their losses.

AARP, NASCAT and CFA submit that any reasoned analysis of the PSLRA's statutory provisions, and their application to the facts and circumstances of this case, must take into account the unprecedented wave of corporate scandals and schemes to violate the federal securities laws that have infected our securities markets over the past ten years. Well-publicized financial scandals at Enron, WorldCom, Qwest, Global Crossing, Adelphia Communications, ImClone Systems, and Tyco International have cost shareholders ***more than $460 billion***.[3] These financial scandals caused investors to question the fundamentals of investing and corporate responsibility.[4] Investors' confidence in the U.S. stock market was so low that in June 2002, investors withdrew more than $18 billion from stock funds, the third largest such withdrawal in history. Joseph F. Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801, 806 (2003). Professor Morrissey asserts that these corporate and accounting scandals

[3] *See* John Paul Lucci, *Enron – The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 212 (2003). When filed, Enron's bankruptcy was the largest in U.S. history, and shareholders lost in excess of $60 billion in market value of Enron's stock. Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud and September 11, 2001*, 76 TUL. L. REV. 1579 (2002); *see also* John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Marianne M. Jennings, *A Primer on Enron: Lessons from a Perfect Storm of Financial Reporting, Corporate Governance and Ethical Culture Failures*, 39 CAL. W. L. REV. 163 (2003); Steven Schwarcz, *Some Thoughts on the Enron Bankruptcy*, 70 U. CIN. L. REV. 1309 (2002).

[4] Ethan G. Zelizer, *The Sarbanes-Oxley Act: Accounting for Corporate Corruption?*, 15 LOY. CONSUMER L. REV. 27, 27 (2002).

demonstrate that "corporate America and its industry insiders (including accountants, investment bankers, brokers and lawyers) seem to influence – if not make – the rules, but subsequently take liberties in complying with or ignoring these rules as they see fit." *Id.* He also poses the following questions that this Court should consider in deciding this case:

> Is there a rule of law in corporate America? Alternatively, have the professional and corporate managerial classes in America been participating in a scheme to present the investing world with a system that seems to be ruled by law but in fact is not? At the same time, the professional and managerial classes have enjoyed enormous profits while most investors have sat by with little recourse or compensation to redress their losses resulting from fraud in the securities markets. . . .
>
> Any nation purporting to be governed by a rule of law must actually provide for mechanisms of enforcement against fraud and deception in its securities markets.

Id. at 806-07, 809 (footnotes omitted). As the Supreme Court of California has recognized, American business "depends on a national investment market" to support its industry. Effective remedies for fraud and market manipulation help ensure that the flow of capital necessary to the growth of American business will continue. *Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539, 557 (Cal. 1999).

When it enacted the PSLRA, Congress codified private securities actions as "an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S. CODE CONG. &

ADMIN. NEWS 730, 731. Lawmakers concluded in 1995 that class actions (like this case) are socially beneficial, both for compensating victims of securities fraud and for deterring future wrongdoing by corporate actors, thereby promoting confidence in the nation's securities markets. *Id.* at 31-32.[5] Private securities litigation "promotes public and global confidence in our capital markets and helps to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers, and others properly perform their jobs." *Id.* at 31; *see also* Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U. L. REV. 1239, 1247-50 (2003). Over the past forty years, this Court has repeatedly recognized an implied private right of action to enforce the securities laws as a supplement to government regulatory efforts for the benefit of defrauded investors and the capital markets generally. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *J. I. Case Co. v. Borak*, 377

[5] More than a decade ago, then-SEC Chairman Richard Breeden told lawmakers that budgetary limitations meant that private class actions must "perform a critical role in preserving the integrity of our securities markets." *Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 102nd Cong. 15-16 (1992) (testimony of then-SEC Chairman Richard C. Breeden). A few years later, Breeden's successor, Arthur Levitt, declared that private lawsuits, rather than government actions, had become "the primary vehicle for compensating defrauded investors." *Common Sense Legal Reform Act: Hearing Before the Subcomm. on Telecomm. & Fin. of the House Comm. on Commerce*, 104th Cong. 1 (1995) (prepared statement of then-SEC Chairman Arthur Levitt) ("Private actions . . . provide a 'necessary supplement' to the [SEC's] own enforcement activities by serving to deter securities law violations. Private actions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws.") (footnote omitted).

U.S. 426, 432 (1964). The PSLRA has now made that implied right an explicit statutory right of action.

Petitioners and their *amici* ignore these important public policies, just as they ignore the express language of the PSLRA's "loss causation" provision at issue in this case. The briefs they filed in this Court fail to mention the ongoing corporate and accounting scandals that have robbed investors of their life savings and sapped their confidence in the securities markets. Needless to say, they also fail to acknowledge some of their own roles in causing billions of dollars in shareholder losses or their potential liability to investors when and if pending securities fraud actions are resolved against them. *See* note 26, *supra*. Their deliberately incorrect reading of the PSLRA would make it much more difficult – if not impossible – for the defrauded investors who lost hundreds of billions of dollars in recent corporate and accounting scandals to recover their losses. This unfortunate result cannot, and should not, be countenanced by this Court.

III. ARGUMENT

A. SECTION 21D OF THE PSLRA DID NOT CHANGE THE TRADITIONAL PLEADING RULES CONCERNING THE "LOSS CAUSATION" ELEMENT OF SECURITIES FRAUD CLAIMS

To state a claim for securities fraud under Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, Respondents must allege that Petitioners (1) made a false statement or omission; (2) of a material fact; (3) with scienter; (4) in connection with the purchase or sale of securities; (5) upon which Respondents justifiably (or reasonably) relied; and (6) that Respondents'

reliance was the proximate cause of their injury. *See, e.g., Miller v. Asensio & Co.*, 364 F.3d 223, 227 (4th Cir. 2004); *In re K-Tel Int'l Sec. Litig.*, 300 F.3d 881, 888 (8th Cir. 2002); *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 174 (3d Cir. 2000).

The Question Presented addresses only the ***causation*** requirement of a Section 10(b)/Rule 10b-5 claim, which has two components: Respondents must allege and prove at trial (a) that Petitioners' violations of the securities laws caused Respondents to engage in their stock transactions ("transaction causation") and (b) that the misrepresentations, omissions, or other violations caused Respondents' harm ("loss causation"). *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2001). "Transaction causation" is the causal connection between a securities fraud defendant's fraud and plaintiff's entering in the transaction in question. *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974); *see also Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1027 (9th Cir. 1999) (establishing transaction causation requires the plaintiff to prove that "but for the fraud, the plaintiff would not have engaged in the transaction at issue"). "[T]ransaction causation is generally understood as reliance." *Castellano*, 257 F.3d at 186. Under *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988), a rebuttable presumption of "transaction causation" is established under the "fraud on the market" theory, even if Respondents were unaware of the fraudulent conduct at the time of their purchases of Dura's common stock.[6] But the

[6] Under the "fraud on the market" doctrine, the trial court must presume that (a) the market price of Dura's common stock actually

(Continued on following page)

"transaction causation" component of securities fraud causation is ***not*** an issue in this case.[7]

Contrary to Petitioners' assertion, nothing in the PSLRA heightened the pleading requirements for the "loss causation" element of Section 10(b)/Rule 10b-5 claims. Rather, as codified in Section 21D(b)(4) of the PSLRA, Respondents have the "burden of **proving** that the act or omission of the [Petitioners] . . . caused the loss for which the [Respondents] seek[] to recover damages." 15 U.S.C. § 78u-4(b)(4) (emphasis added). In a misguided effort to convince this Court to impose a heightened pleading burden, Petitioners and their *amici* misstate the express

incorporated Petitioners' alleged misrepresentations; (b) Respondents actually relied on the market price of those securities as an indicator of their value; and (c) Respondents acted reasonably in relying on the market price of Dura's stock. *Id.* Paragraphs 37, 48, 51, 55, 85, 111, 128, 138 and 174 of Respondents' Second Amended Complaint allege the necessary facts: Dura's common stock traded in an efficient market on the NASDAQ National Market System; the company filed periodic public reports with the SEC; and Respondents and Class members purchased stock during the Class Period. These allegations are sufficient to establish reliance. *See, e.g., In re Ravisent Techs., Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 13255, at *45-46, 2004 WL 1563024 (E.D. Pa. July 12, 2004); *Fogarazzo v. Lehman Bros., Inc.*, 2004 U.S. Dist. LEXIS 9193, at *29, 2004 WL 1151542 (S.D.N.Y. May 21, 2004); *In re Initial Pub. Offering Sec. Litig.*, 297 F. Supp. 2d 668, 670 (S.D.N.Y. 2003).

[7] Citing *Basic*, 485 U.S. at 247, some courts recognize a presumption of "loss causation," asserting that in "fraud-on-the-market" cases, "[c]ausation lies in the fact that the plaintiff relied on the market price of the security as an indicator of the future value of the stock. To the extent that the defendant's misrepresentations artificially altered the price of the stock and defrauded the market, causation is presumed." *In re Control Data Corp. Sec. Litig.*, 933 F.2d 616, 619-20 (8th Cir. 1991); *accord DeMarco v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 110, 124-25 (S.D.N.Y. 2004) (collecting cases).

statutory language of the PSLRA.[8] "However, the PSLRA did not change traditional pleading rules with respect to causation." *Johnson v. Aljian,* 2004 U.S. Dist. LEXIS 14986, at *53 (C.D. Cal. July 30, 2004) (citing *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 830 n.3 (8th Cir. 2003) (noting that the PSLRA's heightened standard for pleading misrepresentations "is not involved in this appeal"; "The complaint's allegations of misconduct are involved here only as they relate to the questions of materiality and loss causation. The new statute does not change traditional pleading rules with respect to those issues."), and *Coates v. Heartland Wireless Comm., Inc.*, 26 F. Supp. 2d 910, 923 (N.D. Tex. 1998) ("the PSLRA does not alter the standards for pleading loss causation")). As the Third Circuit has stated, "this provision" – Section 21D(b)(4) – "does not deal with pleading." *EP Medsystems, Inc. v. Echocath, Inc.*, 235 F.3d 865, 883 (3d Cir. 2000).

"Because the PSLRA does not affect causation pleadings, Plaintiffs' causation pleadings must only meet the traditional 'fair notice' standards" of FED. R. CIV. P. 8(a). *In re Electronic Data Sys. Corp. Sec. & "ERISA" Litig.*, 298 F. Supp. 2d 544, 560 (E.D. Tex. 2004). The Solicitor General asserts that "because loss causation is an element of a fraud cause of action, the allegations must be 'stated with particularity.'" Sol. Gen. Br. at 15 (quoting FED. R. CIV. P. 9(b)). But Rule 9(b) does not say that, and no case applying the PSLRA has so held.

[8] *See, e.g.*, Brief for Petitioners ("Pet. Br.") at 11 (claiming that Section 21D(b)(4) of PSLRA "requires that a plaintiff plead and prove" loss causation); *id.* at 4 (same; "pleading and proving"); *id.* at 15 (asserting that "Congress codified a plaintiff's burden of pleading and proving 'loss causation' in [Section] 10(b) cases"); *id.* at 20 (same). The Brief for the United States as Amicus Curiae ("Sol. Gen. Br.") offers the same distortion of the express statutory language. *See* Sol. Gen. Br. at 6, 8.

In contrast, other subdivisions of Section 21D of the PSLRA, when read in conjunction with FED. R. CIV. P. 9(b), impose heightened pleading requirements that must be satisfied for a complaint sounding in securities fraud to survive a motion to dismiss. For example, Section 21D(b)(1) requires plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).[9] Section 21D(b)(2) also modifies the burden of pleading intent, or scienter, by requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).[10] Thus, under Section 21D of the PSLRA, both falsity and scienter must be alleged with particularity. *See In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002). Reference to these statutory provisions makes clear that Congress knew how and when to impose a heightened pleading burden when it enacted the PSLRA; however, Congress did not do so in Section 21D(b)(4), the "loss causation" provision at issue in this case.

This conclusion is supported by reference to Section 21D(b)(3) of the PSLRA, which states in relevant part: "Dismissal for failure to meet pleading requirements. In

[9] *See, e.g., In re Rockefeller Ctr. Props. Sec. Litig.*, 311 F.3d 198, 218 (3d Cir. 2002) (this "particularity [requirement] . . . extends that of Rule 9(b) and requires plaintiffs to set forth the details of allegedly fraudulent statements or omissions, including who was involved, where the events took place, when the events took place, and why any statements were misleading"). *Accord In re Digital Islands Sec. Litig.*, 357 F.3d 322, 329 (3d Cir. 2004); *In re NUI Sec. Litig.*, 314 F. Supp. 2d 388, 397-98 (D.N.J. 2004).

[10] *See, e.g., Digital Isl.*, 357 F.3d at 329; *NUI Sec.*, 314 F. Supp. 2d at 397-98.

any private action arising under this title, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met." 15 U.S.C. § 78u-4(b)(3)(A).[11] Petitioners and their *amici* ignore Section 21D(b)(3) and its significance. *See, e.g.*, Sol. Gen. Br. at 15. If, as they would have this Court believe, Section 21D(b)(4) imposes a heightened pleading burden for the "loss causation" element, why does Section 21D(b)(3)(A) not direct district courts to dismiss cases that fail to meet that supposed "pleading" burden?

Certain lower federal courts, grasping at threads of the PSLRA's legislative history, assert that Section 21D(b)(4) imposes a heightened pleading requirement for the "loss causation" element of Section 10(b)/Rule 10b-5 securities fraud claims. *See, e.g., D.E. & J.L.P. v. Conaway*, 284 F. Supp. 2d 719, 746 (E.D. Mich. 2003). Because the text of Section 21D(b)(4) is plain and unambiguous, however, there is no need to resort to the PSLRA's legislative history.[12] *See, e.g., Desert Palace, Inc. v. Costa*, 539

[11] Under Section 21D(b)(3), "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss" a securities fraud complaint, "unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3). During the district court proceedings in this case, the PSLRA's "discovery stay" remained in effect and no discovery was conducted.

[12] Indeed, Petitioners laud the "plain language of the [PSLRA]," including Section 21D(b)(4). Pet. Br. at 11. Petitioners cite the "broad" or "overall statutory scheme" of the PSLRA, observing that it amended Section 12(b) of the 1933 Act to provide defendants with an "affirmative defense" of "loss causation." Pet Br. at 11, 15, 18-19. Section 12(b) requires defendants to "***prove***[ ]" that affirmative defense at trial. 15 U.S.C. § 77*l*(b) (emphasis added). As Petitioners concede, it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." Pet. Br. at 20 n.6 (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992)). Therefore, one must

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U.S. 90, 98 (2003) ("And where, as here, the words of the statute are unambiguous, the judicial inquiry is complete.") (citations and internal quotation marks omitted).

Nevertheless, reference to the Senate Report that Congress submitted with the PSLRA demonstrates that Section 21D(b)(4) merely codified securities fraud plaintiffs' burden to **prove** "loss causation" at trial:

> The Committee also requires the plaintiff to show that the misstatement or loss alleged in the complaint caused the loss incurred by the plaintiff. For example, the plaintiff would have to prove that the price at which the plaintiff bought the stock was artificially inflated as the result of the misstatement or omission. The defendant would then have the opportunity to prove any mitigating circumstances, or that factors unrelated to the fraud contributed to the loss.

S. Rep. No. 104-98, at 15 (1995), *reprinted in* 1995 U.S. CODE CONG. & ADMIN. NEWS 679, 694.[13] To whatever extent this

conclude that the word "***proves***" in Section 12(b) of the 1933 Act means the same thing as "***proving***" in Section 21D(b)(4) of the 1934 Act. Petitioners do not explain how an "affirmative defense" of "loss causation" can be "prove[n]" on a motion to dismiss where (as here) they have yet to answer Respondents' Complaint.

[13] S. 240, entitled "The Private Securities Litigation Reform Act of 1995," was introduced in January 1995. S. 240, 104th Cong. (1995). *See* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 350 (1996) (discussing introduction of S. 240). The first version of S. 240, dated January 22, 1995, contained the following "loss causation" provision:

> and in which the plaintiff claims to have bought or sold the security based on a reasonable belief that the market value of the security reflected all publicly available information, the plaintiff shall have the burden of proving that the misstatement or omission caused any loss incurred by the plaintiff.

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Court can even consider the PSLRA's relevant legislative history, nothing in the Senate Report even hints at a heightened pleading burden for the "loss causation" element.

With regard to securities fraud actions that are subject to the PSLRA, the Seventh Circuit has pronounced that loss causation is a "practical requirement" that "ought not place unrealistic burdens on the plaintiff at the initial pleading stage." *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). "It does not require . . . that the plaintiff plead that all of its loss can be attributed to the false statement of the defendant." *Id.*; *accord In re Enron Corp. Sec. Litig.*, 310 F. Supp. 2d 819, 831-32 (S.D. Tex. 2004); *In re Rhythms Sec. Litig.*, 300 F. Supp. 2d 1081, 1092 (D. Colo. 2004) ("It is not Plaintiffs' burden to prove loss causation in the pleadings.") (citation omitted).

In order to survive a motion to dismiss for failure to plead loss causation, Respondents must "adequately allege a causal connection between" Petitioners' misleading statements or omissions and the decline in value of Dura's common stock. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003). Although Petitioners might be able to demonstrate that some intervening event caused investors' losses, "such is a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss." *Id.*[14]

S. 240, § 104. Conferees of the Senate and House met in November 1995 and reconciled the differences between S. 240 and the House bill, H.R. 1058, which also contained a "loss causation" provision. Although the conferees made several significant changes, the bill's final form was predominantly based on the Senate version.

[14] The same is true of the "truth-on-the-market" defense, where securities fraud defendants seek to counter the "fraud-on-the-market" reliance presumption (*see* note 6, *supra*) by showing that the investing

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As Petitioners observe, "loss causation" allows courts to "take account of intervening factors, such as a war or a recession, that may have caused the price decline" of a particular stock. Pet. Br. at 21. Given the procedural posture of this case, Petitioners cannot identify any such "intervening factors," and they did not do so in the courts below. According to the Second Circuit, "if the loss was caused by an intervening event, like a general fall in the price of Internet stocks, the chain of causation will not have been established. But such is a matter of proof at trial and not to be decided" on a motion to dismiss. *Emergent Capital*, 343 F.3d at 197; *accord In re Initial Pub. Offering Sec. Litig.*, 2004 U.S. Dist. LEXIS 20497, at *166 & n.378, 2004 WL 2297401 (S.D.N.Y. Oct. 13, 2004). This Court recognized in *Basic*, 485 U.S. at 249 n.29, that "[p]roof of that sort is a matter for trial."[15]

In pre-PSLRA cases, the federal courts uniformly recognized that securities fraud plaintiffs were required to prove "loss causation" at trial, and that "causation" issues presented factual questions that must be resolved by juries. *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975). The Seventh Circuit recognizes that

public received accurate, "corrective information" from an alternate source "with a degree of intensity and credibility sufficient to counterbalance effectively any misleading information created by the alleged misstatements." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000) (citation omitted). "[T]he truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a [Section] 10(b) complaint for failure to plead materiality." *Id.*

[15] *Accord In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 13147, at *58-59, 2004 WL 1554840 (S.D.N.Y. 2004); *DeMarco*, 318 F. Supp. 2d at 124 & n.6 (while "defendants may be able to show after discovery that an unforeseeable intervening event caused the stock price to decline," court recognized that "[t]hese are all matters for the factfinder on a fully-developed record"); *In re Initial Public Offering Sec. Litig.*, 297 F. Supp. 2d 668, 675 & n.33 (S.D.N.Y. 2003) (same).

nothing precludes a securities fraud defendant "from submitting, at the summary judgment stage, that [plaintiff] cannot prove the loss causation that it has alleged" in the complaint. *Caremark,* 113 F.3d at 649. "At summary judgment, this burden usually is met by establishing that the decline in the value of the security is attributable in total to some other factor." *Id.* at 649-50 (citation omitted). "To defeat Caremark's claim at summary judgment, . . . Coram would have to establish that, as a matter of undisputed fact, the depreciation in the value of the [securities] could not have resulted from the alleged false statement or omission of the defendant." *Id.* at 650.[16]

This approach was typified by *Huddleston v. Herman & MacLean,* 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983), a securities fraud class action brought by investors who alleged that misstatements had been made by defendants in the prospectus for a securities offering to raise money to construct an automobile racetrack. Investors proved at

[16] Thus, in *In re AOL Time-Warner Sec. & "ERISA" Litig.*, 2004 U.S. Dist. LEXIS 7917, 2004 WL 992991, Fed. Sec. L. Rep. (CCH) ¶ 92,812 (S.D.N.Y. May 5, 2004), a securities fraud class action was filed following the restatement of $477 million in advertising revenue purportedly earned by AOL Time Warner ("AOLTW"). In its motion to dismiss, AOLTW contended that Plaintiff's "economic harm was not a result of the alleged misrepresentations, but rather the product of intervening external forces, such as the marketwide decline in Internet stocks and the fallout from the September 11 [, 2001] terrorist attacks." 2004 U.S. Dist. LEXIS 7917, at *96-97. Judge Kram stated that "defendants will have every opportunity at trial to prove that the decline in AOLTW stock was caused by September 11, 2001, its aftermath and generalized market conditions; AOLTW will not, however, have that opportunity now [on a motion to dismiss]." *Id.* at *97 n.39; *see also Movitz v. First Nat'l Bank*, 148 F.3d 760, 762 (7th Cir. 1998) (reversing jury verdict for plaintiff real estate investor because defendant bank proved at trial that loss was caused by "disastrous downturn that the Houston real estate market experienced in the early 1980s").

trial that the racetrack's promoters and accountants had fraudulently induced them to purchase stock by overstating the company's working capital and understating the costs of completing the project. 640 F.2d at 539 & n.2. Subsequently, the business failed and the racetrack filed for bankruptcy. After a three-week jury trial, the trial court submitted the case to the jury on special issues concerning whether the speedway prospectus was materially misleading and, if so, whether this was done with scienter of various defendants; however, the judge refused to submit special issues relating to reliance and causation. *Id.* Based upon the jury verdict, the district court awarded the defrauded securities purchasers the difference between the purchase price of the securities and the proceeds received by them on any sale of the securities. The trial court awarded the full purchase price to those investors who still held their securities because those securities essentially were worthless. *Id.* at 554.

On appeal, the Fifth Circuit addressed the problem as an issue of both loss causation and damages calculation. Addressing loss causation, the court ruled that the plaintiff could only prevail if "the untruth was in some reasonably direct, or proximate, way responsible for his loss." *Id.* at 549. The Fifth Circuit stated that the "causation" element is satisfied in a Section 10(b)/Rule 10b-5 case "if the [defendants'] misrepresentation touches upon the reasons for the investment's decline in value." *Id.* "If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under [Section 10(b)/Rule 10b-5] is not permitted." *Id.* (footnote omitted). Because at trial the defendants attributed the racetrack's failure to the materialization of risks described in the prospectus, such as bad weather conditions and lack of

spectator attendance at the racetrack, the trial court erred in failing to instruct the jury on the issue of proximate cause. *Id.* at 549-50. "The trial court's failure to submit the reliance and causation issues to the jury requires us to grant a new trial." *Id.* at 550.[17]

The Fifth Circuit's wisdom in *Huddleston* has stood unchallenged for more than two decades and was echoed by the Third Circuit in *EP Medsystems*, 235 F.3d at 884, which observed that the "causation issue becomes most critical at the proof stage. Whether the plaintiff has proven causation is usually reserved for the trier of fact."[18] Nothing in Section 21D(b)(4) of the PSLRA (or its legislative history, for that matter) changed the traditional pleading rules governing the "loss causation" element of Section 10(b)/Rule 10b-5 claims, or the lower courts'

[17] *See generally* Michael J. Kaufman, *Loss Causation: Exposing a Fraud on Securities Law Jurisprudence*, 24 IND. L. REV. 357, 363-64 (1991) (discussing *Huddleston*); Andrew L. Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong*, 66 TEX. L. REV. 469, 478-79 (1988) (same).

[18] In *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997), investors sought to prove at trial that a decline in the company's stock price provided the measure of their loss, but they could not prove any connection between that decline and the accounting fraud alleged. Nevertheless, the jury returned a verdict in the investors' favor. Uncontradicted evidence introduced by defendants at trial showed that the stock dividend was cut because the company was concerned that future financing would be unavailable, not because it "discovered [and then disclosed] that past accounting errors had overstated its cash flow." *Id.* at 1448. Plaintiffs were unable to show that the drop in stock price was related to defendants' alleged misrepresentations, thus, the Eleventh Circuit held that the trial court had properly granted defendants' Rule 51(a) motion to set aside the jury verdict because plaintiffs had failed to satisfy the "loss causation" requirement. *Id.* at 1448-49. In this case, however, because the district court's "loss causation" ruling was made on Petitioners' motion to dismiss Respondents' Complaint, "*Robbins* is inapplicable here." *Danis v. USN Communs., Inc.*, 73 F. Supp. 2d 923, 943 n.13 (N.D. Ill. 1999).

repeated recognition that "causation" issues in securities fraud cases present factual questions for triers of fact. In the following section, we demonstrate that whatever "pleading standard" is employed, Respondents properly pled the "loss causation" element in this case.

B. THE COURT BELOW CORRECTLY HELD THAT RESPONDENTS PROPERLY PLED THE "LOSS CAUSATION" ELEMENT OF THEIR SECTION 10(B)/RULE 10B-5 CLAIMS

In its opinion in this case, the Ninth Circuit correctly posited the test for "loss causation" in a Section 10(b)/Rule 10b-5 case: "In this circuit, loss causation is satisfied where 'the plaintiff shows that the misrepresentation touches upon the reasons for the investment's decline in value.'" *Broudo v. Dura Pharms., Inc.*, 339 F.3d 933 at 937-38 (citations and internal quotations marks omitted).[19] After citing and quoting from Ninth, Second and Eighth Circuit cases offering the same formulation of the applicable "loss causation" test, the court below explained:

> [F]or a cause of action to accrue, it is not necessary that a disclosure and subsequent drop in the market price of the stock have actually occurred, because the injury occurs at the time of the

[19] This is the same formulation stated by the Fifth Circuit in *Huddleston*, 640 F.2d at 549, as quoted above. Professor Kaufman states that the phrase "touches upon" is taken from this Court's opinion in *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971). *See Kaufman, Loss Causation*, 24 IND. L. REV. at 363 & n.48. Quoting *Huddleston*, 640 F.2d at 549, the Ninth Circuit stated the same rule in *McGonigle v. Combs*, 968 F.2d 810, 821 (9th Cir. 1992). *See also Nathenson v. Zonagen Inc.*, 267 F.3d 400, 413 n.10 (5th Cir. 2001) (defendants' actions need only "touch[] upon the reasons for the investment's decline in value").

> transaction. It is at that time that damages are to be measured. Thus, loss causation does not require pleading a stock price drop following a corrective disclosure or otherwise. It merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause.

339 F.3d at 938 (footnote omitted). Even though the court below did not cite Section 21D(b)(4) of the PSLRA, the rule the Ninth Circuit stated matched perfectly the explication of the "loss causation" rule offered in the Senate Report: "For example, the plaintiff would have to prove that the price at which the plaintiff bought the stock was artificially inflated as the result of the misstatement or omission." S. Rep. No. 104-98, at 15, *reprinted in* 1995 U.S. CODE CONG. & ADMIN. NEWS at 694.

In a footnote, the Ninth Circuit observed that some other circuit courts "do require demonstration of a corrective disclosure followed by a stock price drop to be alleged in the complaint." *Id.* at 938 n.4 (citing the Third Circuit's decision in *Semerenko,* 223 F.3d 165). But, as set forth below, Respondents' allegations in this case were more than sufficient to satisfy even this (arguably) more stringent "loss causation" pleading standard.

In their Second Amended Complaint, Respondents asserted securities fraud claims on behalf of investors who purchased Dura securities, including common stock and subordinated notes, between April 15, 1997 and February 24, 1998 (the "Class Period"). JA 138a-139a.[20] During the

[20] This is the Class Period identified in Paragraphs 1 and 172 of Respondents' Second Amended Complaint; however, because Respondents' securities fraud claims against Petitioners were dismissed on a Rule 12(b)(6) motion, Respondents never moved for class certification. Following appropriate discovery, Respondents foreseeably could have

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Class Period, Petitioners – Dura and its high-ranking corporate officers – made false and misleading statements regarding the company's "Spiros" drug delivery device for the asthma medicine Albuterol (the "Albuterol Spiros Device"), and its "Ceclor CD" antibiotic. JA 34a-58a. Petitioners falsely claimed that completed testing showed the Albuterol Spiros Device was effective, that it was poised for approval by the U.S. Food & Drug Administration ("FDA"), and that it was expected to add $100 million in sales by 2000. In fact, Dura's clinical trials and in-house tests showed that the Albuterol Spiros Device was fatally flawed. Petitioners also falsely claimed that Ceclor CD sales were strong and increasing during the Class Period; however, Ceclor CD sales were dropping each quarter, with extra product clogging Dura's sales channels as Petitioners sought to revive flagging sales numbers. JA 48a-52a. *See Broudo,* 339 F.3d at 935-36 (summarizing Respondents' allegations and quoting from Petitioners' public statements indicating satisfactory development and testing of Albuterol Spiros Device and claiming rising sales of Ceclor CD, "both of which [Respondents] allege were known to [Petitioners] to be untrue").

Between June 1997 and February 1998, the four named Plaintiffs purchased shares of Dura stock at prices from $36.35 to $45.35 per share. JA 59a-60a. During the Class Period alleged in the Second Amended Complaint, Dura's

filed a motion to certify a different (*i.e.*, longer) Class Period. The federal courts have repeatedly recognized that they are "not bound by the class definition proposed in the complaint." *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 184-85 (1974) (Douglas, Brennan & Marshall, JJ., dissenting); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1700, at 270 (1986).

stock reached $52-1/4 per share (on October 8, 1997), an all-time high. JA 45a, 67a, 81a, 94a.[21] On February 24, 1998, Dura revealed that it expected lower-than-forecast 1998 revenues and earnings per share due to, *inter alia,* slower-than-expected sales of Ceclor CD. JA 51a, 110a-111a. Dura's stock price then dropped from $39.12 on February 24, 1998 to $20.75 on February 25, 1998, ***a 47% one-day loss*** marked by an unprecedented 32-million share trading volume. JA 51a. In contemporaneous published reports, securities analysts excoriated Petitioners, stating that "[m]anagement credibility has been severely damaged by this [earnings] announcement, particularly in light of recent investor conference presentations exuding confidence on the Company's fundamentals. . . ." JA 109a.[22]

Later, in an April 16, 1998 telephone conference call with stock analysts, Dura revealed that as early as December 1997, wholesale channels had been clogged with many months of excess inventory and that actual sales of several products, including Ceclor CD, had in fact been declining. JA 110a. Then, in November 1998, Dura revealed that the FDA had decided not to approve the

[21] Respondents allege that Petitioners took advantage of Dura's inflated stock price and profited handsomely from their scheme to defraud investors. In July 1997, Dura successfully completed a $287.5 million convertible note offering, the largest securities offering in the company's history. JA 92a. Two of the lead plaintiffs purchased 65 of those notes at a price of $1,000 each. JA 60a. Dura's insiders sold nearly 200,000 shares of their stockholdings, netting $7.27 million in proceeds. JA 120a-122a. Three months later, after Dura's stock price reached its all-time high, certain Petitioners again unloaded their stockholdings, netting $9.2 million in proceeds. JA 105a, 120a-122a. Thus, Respondents allege that Petitioners garnered over $300 million from securities offerings and insider bailouts.

[22] Over the ensuing months, Dura's stock price dropped another 40% on further bad news. *See* JA 54a (stock price chart).

Albuterol Spiros Device due to electro-mechanical reliability issues and chemistry, manufacturing, and control concerns. JA 110a, 111a; *Broudo,* 339 F.3d at 936. Even with the FDA's rejection announcement, however, Petitioners failed to truthfully disclose to investors the FDA's directive that further clinical trials must be conducted, prompting the FDA to issue a "notice of violation" to Dura three days later. The FDA notice stated that Dura had "misleadingly minimize[d] the fact that Dura must conduct a completely new clinical data [study]." JA 111a. Although Petitioners failed to reveal the complete truth about Dura's dealings with the FDA, even upon Petitioners' November 1998 revelations concerning the FDA's rejection of the Albuterol Spiros Device, Dura's stock price dropped ***another 21% in a single day***, from $12.37 to $9.75 per share. JA 156a.

AARP, NASCAT, and CFA submit that Respondents' allegations, taken as a whole, properly allege the "causation" and "damages" elements of their Section 10(b)/Rule 10b-5 claims. "Damages for securities fraud under § 10(b) or Rule 10b-5 need not be pleaded with specificity, particularly at the pleading stage of the litigation." *In re Credit Suisse First Boston Corp. Sec. Litig.,* 1998 U.S. Dist. LEXIS 16560, at *34, 1998 WL 734365 (S.D.N.Y. Oct. 19, 1998) (citation omitted). Under the well-settled rule followed in securities cases, the measure of damages is Respondents' and Class members' "out-of-pocket" loss, or the difference(s) between the price(s) they paid for Dura securities and the value of securities received at the time of their purchase(s).[23]

[23] *See, e.g., Randall v. Loftsgaarden,* 478 U.S. 647, 662 (1986); *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 155 (1972); *Ambassador Hotel,* 189 F.3d at 1030; *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1437 (9th Cir. 1987) ("out-of-pocket" rule fixes recoverable damages

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At trial, and on a complete evidentiary record – including "event studies" prepared by expert witnesses – the trier of fact will determine the amount of damages, if any, Respondents are entitled to recover.[24] But "[t]hese are all

as "the difference between the purchase price and the value of the stock at the date of purchase") (citation omitted). The principle underpinning this rule is that plaintiff's injury is not the loss of what he or she might have gained if the false facts had been true, but rather what he or she has actually lost by being deceived into the purchase. *See Wool*, 818 F.2d at 1437 n.2; *see also* Jay W. Eisenhofer *et al., Securities Fraud, Stock Price Valuation, and Loss Causation: Toward a Corporate Finance-Based Theory of Loss Causation*, 59 BUS. LAW. 1419, 1424-28 (2004).

The "out-of-pocket" measure of damages is traceable to *Sigafus v. Porter*, 179 U.S. 116 (1900), where plaintiff was fraudulently induced to invest in a gold mine whose value had been exaggerated by defendant. "[T]he loss, in the transaction before us, is the difference between the real value of the stock at the time of the sale, and the fictitious value at which the buyer was induced to purchase. . . . " *Id.* at 124 (citation omitted). Justice Harlan wrote that the "same principle was recognized" by the English Court of Appeal in *Peek v. Derry*, 37 Ch. Div. 541 (1889), an action to recover damages for defendant's fraudulent representations whereby plaintiff was induced to take shares in a certain company at the price of £ 4000:

> The question of the proper measure of damages in such a case was directly presented and considered. Lord Justice Cotton said: "The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £ 4000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £ 4000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants, was having the shares, instead of having in his pocket the £ 4000. The loss, therefore, must be the difference between his £ 4000 and the then value of the shares."

179 U.S. at 124.

[24] In his concurring opinion in *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1341 (9th Cir. 1976), Judge Sneed set forth a milestone theory for calculating damages, postulating that in any securities fraud

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matters for the factfinder on a fully-developed record." *DeMarco*, 318 F. Supp. 2d at 124 n.6.[25]

In this case, the Ninth Circuit held that Respondents had satisfied the "loss causation" element of their securities fraud claims by alleging that Dura's stock price was overstated at the time of their purchases and providing "sufficient identification" of the cause for this overvaluation; namely, Petitioners' material misrepresentations and omissions concerning the Albuterol Spiros Device and Ceclor CD sales. *Broudo*, 339 F.3d at 939. Under well-settled precedent, Respondents would satisfy the "loss causation" requirement by pointing to a subsequent stock price drop. *See Blackie*, 524 F.2d at 909 n.25. They will then have shown that Petitioners' misleading statements "touch upon" the reasons for the stock's later decline in value. *See Provenz v. Miller*, 102 F.3d 1478 at 1492. But while a drop in price upon corrective disclosure "is of course circumstantial evidence of the inflation when

class action, the best way to measure the loss proximately caused by defendant's misrepresentation is to create a chart containing a "price line" and a "value line." Under this method, damages are calculated by subtracting the true value of the stock on the date of purchase from the price actually paid, with the spread between the price and value lines varying over time.

[25] Under Section 21D(e)(1) of the PSLRA, the damages awarded in any securities fraud action "shall not exceed the difference between the purchase . . . price paid . . . by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C. § 78u-4(e)(1). Although the relevant "mean trading price" of Dura stock has not been established, and the issue was not briefed or discussed in the court below, Respondents have calculated that the "mean trading price" was $12.96. Respondents paid more than double this approximated "mean trading price" for their Dura stock.

purchased, . . . it is not the exclusive method of measuring inflation." *Blackie,* 524 F.2d at 909 n.25.

Decisions from other circuit courts demonstrate that Respondents' allegations in this case were more than sufficient. In *Gebhardt,* 335 F.3d at 827, the investors' class action alleged that United Agri Products ("UAP"), a wholly-owned subsidiary of ConAgra Foods, engaged in misleading accounting practices, thereby causing UAP's (and, hence, ConAgra's) earnings statements to be overstated. In May 2001, ConAgra announced that, due to UAP's subterfuge, it was going to have to restate its past and present earnings. The company's stock price dropped by about 4% the day after the announcement. *Id.* Reversing the district court's dismissal of the case due to the investors' purported failure to allege "loss causation," the Eighth Circuit stated in relevant part:

> The plaintiffs also demonstrated loss causation by pleading that a decline in the value of their stock was related to UAP's accounting issues. They did plead this, and the stock declined by roughly 4 per cent the day after the May announcement. This was a sufficient allegation of a causal link between the company's misbehavior and a subsequent decline. . . .

Id. at 831. On appeal, ConAgra argued that because its stock's value increased in the weeks following the May 2001 announcement, plaintiffs could "show no connection between the misrepresentations and any loss." *Id.* In a passage that is relevant to this case, the Eighth Circuit rejected this contention on substantive and procedural grounds:

> [S]tockholders can be damaged in ways other than seeing their stocks decline. If a stock does not appreciate as it would have absent the fraudulent conduct, investors have suffered a harm. Therefore, we decline to attach dispositive significance to the stock's price movements absent sufficient facts and expert testimony, which cannot be considered at this procedural juncture, to put this information in its proper context.

Id. at 831-32.

In *Semerenko,* the case cited by the Ninth Circuit in footnote 4 of its decision, the Third Circuit equated "loss causation" with proximate cause, stating that there must be a "sufficient causal nexus between the loss and the alleged misrepresentation." 223 F.3d at 184. In that case, plaintiffs alleged that they purchased shares at a price that was inflated due to misrepresentations made by several corporate officers and directors and that, when the truth was made known, the company's stock price dropped to its true value. *Id.* at 185. As in this case, the investors' complaint in *Semerenko* alleged that defendants' misrepresentations

> directly or proximately caused, or were a substantial contributing cause of, the damages sustained by plaintiff and the other members of the Class. The misstatements . . . had the effect of creating in the market an unrealistically positive assessment of Cendant, as well as of its financial condition, causing ABI's common stock to be overvalued and artificially inflated at all relevant times.

Id. at 186. Defendants urged that plaintiffs did not adequately plead "loss causation" but the Third Circuit rejected that argument, finding that these allegations adequately pled this element. *Id.; see also EP Medsystems,* 235 F.3d at 883-85 (discussing and following *Semerenko*).

Other circuit courts have reached the same result when analyzing similar securities fraud "loss causation" allegations. *See Emergent Capital,* 343 F.3d at 197-99 (holding that allegations of a "pump and dump scheme," in

which defendants allegedly inflated a security's market price so that they could sell shares before it fell, provided a sufficient connection between defendants' misrepresentations and plaintiffs' losses); *see also Suez Equity Investors,* 250 F.3d at 97-98; *Caremark,* 113 F.3d at 649-50. In addition, a legion of recent district court decisions construing and applying Section 21D(b)(4) of the PSLRA have reached the same conclusion. *See, e.g., Enron,* 310 F. Supp. 2d at 832 (holding that investors' amended complaint "does allege the requisite loss causation between plaintiffs' alleged economic loss and the acts, misrepresentations, missions, and/or concealment of the realities underlying the sham financial reports and image of success projected by Enron and co-Defendants").[26]

[26] *See also Crowell v. Ionics, Inc.*, 2004 U.S. Dist. LEXIS 22254, at *62, 2004 WL 2475332 (D. Mass. Nov. 3, 2004) ("The pleading burden for [loss causation] is only a 'minimal burden,' much less than the 'strong inference' requirement for scienter, and can be satisfied by alleging that the Ionics Defendants' misstatements artificially inflated the price of Ionics common stock during the class period.") (footnote and citations omitted); *In re Initial Public Offering Sec. Litig.*, 2004 U.S. Dist. LEXIS 20552, at *61-65, 2004 WL 2320364 (S.D.N.Y. Oct. 15, 2004) (refusing to dismiss securities fraud complaint on "loss causation" grounds); *Johnson*, 2004 U.S. Dist. LEXIS 14986, at *54 ("Plaintiff alleges he would not have purchased the DCX stock if he was aware of this artificial [stock price] inflation. Plaintiff's allegations satisfy the causation pleading requirement. . . ."); *In re Stellent, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 14152, at *35 n.7, 2004 WL 1646500 (D. Minn. July 23, 2004) ("The entire Amended Complaint is premised on the allegation that Stellent's stock plummeted as the truth about the company's dubious transactions became known. This is loss causation, classically pled, and does not require the company to have restated revenues.") (citation omitted); *In re Tyson Foods, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 1112[illegible], at *35-36 (plaintiffs adduced sufficient evidence of "loss causation" to withstand defendants' summary judgment motion); *Fogarazzo*, 2004 U.S. Dist. LEXIS 9193, at *40-41 ("plaintiffs here have adequately alleged that the Banks' misrepresentations caused their loss . . . the Banks are alleged to have lied about

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IV. CONCLUSION

AARP, NASCAT, and CFA submit that the Ninth Circuit correctly found that Respondents properly alleged the "loss causation" element of their Section 10(b)/Rule 10b-5 claims. For the reasons stated herein, if this Court reverses the decision of the court below and accepts Petitioners' misguided construction of the PSLRA's "loss causation" provision, it will make it much more difficult – if not impossible – for defrauded investors who have been victimized in the above-referenced multi-billion dollar securities frauds to recover their out-of-pocket losses. Any such result will further diminish investors' confidence in our securities markets.

the financial health and future prospects of RSL – namely, the investment quality of RSL securities . . . RSL ultimately failed because of the very facts that the Banks misrepresented: that RSL was in financial trouble and that the entire 'internet telephony sector' was collapsing"); *AOL Time Warner*, 2004 U.S. Dist. LEXIS 7917, at *97 ("the Amended Complaint quite clearly alleges losses caused by a disparity between the transaction price and the true investment value of AOL and AOLTW. As such, loss causation is properly pled. . . .") (footnote omitted); *DeMarco v. Lehman Bros.*, 309 F. Supp. 2d 631, 636 (S.D.N.Y. 2004) ("assuming arguendo that plaintiffs must plead that their losses resulted from the marketplace's reaction to the revelation of the truth that defendant's actionable statements concealed (as contrasted to independent market forces), the Complaint adequately alleges that in or around October, 20[illegible]0 the market was finally apprised of the negative information concerning RealNetworks . . . and that, as the result of those revelations, the stock declined, causing the losses on which plaintiffs here sues"); *Electronic Data Sys.*, 298 F. Supp. 2d at 560 ("Defendants' misrepresentations inflated the stock value such that the stock value decreased when investors learned of the problems with the NMCI Contract").

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Respectfully submitted,

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